No. 11922

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLEM J. CUSACK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Appellee and Plaintiff.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This appeal is from a judgment of conviction for the offense of unlawfully selling and offering for sale transportation of property by motor carrier in interstate commerce, for compensation, without holding a broker's license issued by the Interstate Commerce Commission, said acts being in violation of Title 49, U. S. Code, Section 311(a), said judgment having been entered by the United States District Court for the Southern District of California at Los Angeles, California, on April 22, 1948. [Tr. 18.]

The defendant and appellant, Clem J. Cusack was charged by an information in ten similar counts with having violated the Interstate Commerce Act by contracting, offering to contract, and holding himself out as one who

sells, provides, procures, and arranges for such transportation of household goods by motor carrier in Interstate Commerce from Los Angeles, California, to the various points in the United States or from distant points in other states to Los Angeles, without having a broker's license as required by Section 311(a) of Title 49, U. S. Code. The dates of said various offenses fall within 1946 and 1947. [Tr. 2-10.]

On Count Two of the Information, a motion to acquit was made by the defendant at the end of the Government's case, which was granted by Court on April 21, 1948. [Tr. 122, 123.]

A verdict of guilty was returned by the jury on all of the ten counts as charged, except Count II, in which case a judgment of acquittal was entered by the Court. [Tr. 16.]

It was further adjudged on April 22, 1948, that the defendant pay a fine to the United States in the sum of $100 on each of the nine counts in which he was convicted, making a total of $900 in fines to be paid. The defendant was committed to a jail type of institution in lieu of payment of his fine or until said fines were paid or the defendant otherwise discharged according to due process of law. [Tr. 19.]

A notice of appeal from the above-entitled judgment was filed by defendant on May 3, 1948, to this Court [Tr. 19, 20], which Court has appellate jurisdiction under Title 28, U. S. Code, Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

The Facts.

Since no statement of facts has been set forth in appellant's opening brief, the following summary of evidence pertinent to the questions before this Court is hereby submitted.

The appellant and defendant, Clem J. Cusack was in business in Los Angeles, California, and was known as the Lincoln Transfer and Storage Company [Tr. 152], but had no trucks of his own and did no hauling in interstate commerce whatsoever. [Tr. 152.] He had no license or permit, or certificate of convenience and necessity as a motor carrier in interstate commerce. It is undisputed that he had no broker's license issued by the Interstate Commerce Commission. [Tr. 152; Pl. Exh. 5 and 6, Tr. 80-83.] However, he advertised in the local newspapers [Tr. 92] and in the classified advertising section of the Telephone Directory under the name of Lincoln Transfer and Storage Company. [Tr. 152, Pl. Exh. 8; also Tr. 89-91.]

The latter advertisement required one-quarter page or one-fourth of a classified ad in the directory and read as follows:

> "Long distance moving to and from everywhere.
> "Daily bookings to all principal cities. Our return load system saves you $ $.
> "Door to door service.
> "No crating necessary. Don't move before checking our rates.
> "LINCOLN STORAGE AND TRANSFER COMPANY.
> "Agent. 601 South Vermont Avenue.
> "24 Hr. telephone service Drexel 4297. [Pl. Exh. 8 and Tr. 182.]

Defendant maintained an office in Los Angeles. The address and business telephone being the same as that stated in the advertisement set forth in Plaintiff's Exhibit 8. [Tr. 154, 155.] It is undisputed that defendant made contracts [Tr. 151 and 152] with at least nine shippers or private parties for shipment of their household goods. He arranged for or attempted to procure transportation to and from Los Angeles and received compensation therefor.[1]

In all these transactions, the shipper was credited on his freight bill with money received by defendant Cusack, but who received a commission himself from each of the transactions. [Tr. 154.] In procuring business and transportation for one motor carrier, the Commission received was twenty per cent of the complete freight cost. [Tr. 155.]

In the matter of shipments involved in Counts I, III, and VII, wherein goods were delivered by Von der Ahe

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[1]For evidence on Count One and Testimony;

Count I. [Tr. 147; Tr. 83-87, also Pl. Exh. 7 and Tr. 86.] Los Angeles to San Antonio, Tex., shipment; $45 paid def.

Count III. [Tr. 146, 147; Tr. 68-74, and Pl. Exh. 4.] Freemont, Neb., to Calif. shipment; $100 paid to def.

Count IV. [Tr. 144, 153; Tr. 31-39, and Pl. Exh. 1.] Cedar Rapids, Ia., to Gardena, California shipment; $50 paid to def.

Count V. [Tr. 98-103; Tr. 142.] Covington, Ky., to Los Angeles, shipment; $85 paid to def.

Count VI. [Tr. 142; Tr. 39-48, and Pl. Exh. 2.] Chicago to Long Beach, shipment; $50 paid to def.

Count VII. [Tr. 141, Tr. 48-54, and Pl. Exh. 3.] Charleroi, Pa., to Los Angeles, Calif., shipment; $30 paid to def.

Count VIII. [Tr. 106-109; Tr. 135, and Pl. Exr. 12.] Hibbing, Mont., to Long Beach, shipment; $50 paid to def.

Count IX. [Tr. 133, 134; Tr. 92-95, and Pl. Exh. 9.] Long Beach to Wash., shipment; $50 paid to def.

Count X. [Tr. 129-132; Tr. 110-115.] Long Beach to Belgrade, Mont., shipment; $50 paid to def.

Moving and Storage Company of St. Louis, as agents of National Van Lines, the latter had a certificate of convenience and necessity or Interstate Commerce Commission permit to serve western territory. The Von der Ahe Company had no through permit to California, but did have a leasing agreement as an agent for National Van Lines. [Tr. 55-57.] Defendant was not an agent for National Van Lines and Von der Ahe Company had no authority from its principal to employ a sub-agent without written authority. No written authority was given to employ defendant as an agent or sub-agent. [Tr. 57.]

In the transaction involved in Count IV, defendant did not say he was an agent for the Von der Ahe Company, but said they would move the goods in question; he represented that he was doing business as Lincoln Van and Storage Company. [Tr. 35.] Relative to the transaction under Count V, defendant represented that his own trucks would haul the shipment in Interstate Commerce; namely, the Lincoln Transfer Company. No agency for another carrier was disclosed. [Tr. 99-100.] In the transaction under Count VI, a like representation was made. [Tr. 42-43.] Regarding the shipment involved in Count VIII, defendant did not disclose an agency for any other company: he completed the transaction but another carrier delivered the goods. [Tr. 106-112, and Pl. Exh. 12.]

Relating to the transaction under Count IX, defendant represented that he had his own van [Tr. 94]; but he knew the Red Ball Company was the agent for North American Lines which delivered the goods in question from Los Angeles to Seattle: that the Red Ball Company had no Interstate authority: that he had no agreement with North American Lines as sub-agent [Tr. 154], but that he had an agreement with Red Ball Company. [Tr. 153.] In

relation to the transaction under Count X the Belmont Storage Company was an agent for United Van and Storage Company which hauled the goods from California to Belgrade, Mont. [Tr. 113], and the Belmont Company had no interstate authority. Defendant dealt with the Belmont Company and gave them authority to forward the goods by United Van Lines and signed the letter of authority as Lincoln Transfer Company, shipper. [Tr. 114, and Pl. Exh. 13.] Defendant was not an agent for United Van Lines, and had no arrangement with them at the time of the contract. [Tr. 154.] Under the general advertisement published by defendant in the telephone directory the word "agent" appears in small print, but does not say agent for whom. [Pl. Exh. 8, and Tr. 182.]

Questions Involved.

1. Whether or not there was sufficient evidence in the record to justify the denial of a motion for acquittal at the end of the Government's case.
2. Whether or not the trial court abused its discretion in its denial of a motion to set aside the verdict and arrest the judgment.
3. Whether there was substantial evidence on each count to support the verdict on that count.
4. Whether a defendant may complain upon appeal that he was convicted under the wrong section of the Act where he takes the stand and testifies, admitting most of the elements necessary to prove the offenses charged.
5. Whether an instruction phrased in the language of the statute is reversible error where the defendant stated to the Court that he had no objection to the instructions as given to the jury.

ARGUMENT.

Summary.

The appellant and defendant bases his appeal primarily upon the ground that the trial court committed error in overruling his motion for acquittal, and further that error was committed in denying his motion to set aside the judgment. Further grounds alleged are that there was no evidence in the record to support a verdict of guilty as charged; that the defendant was convicted under the wrong section of the Statute, if anything. Also, that the Trial Court committed error either in its instruction or by representing to the jury that a mere holding out to perform or arrange transportation subject to the Interstate Commerce Act constituted brokerage under Section 311(a) of the Act.

At the end of the Government's case, defendant made a motion for acquittal which was denied. At that point, the Government had rested after calling witnesses who testified in connection with each of the nine counts on which a verdict was rendered at the end of the trial. A prima facia case was made out with substantial evidence on each count that defendant had become known to the witnesses through advertisement in the telephone directory or in local newspapers and that he had come to their homes or met them elsewhere to discuss the movement of their household goods in Interstate Commerce. In all of these cases, the parties had paid a sum of money by way of down payment or as a part of the shipping charges directly to Mr. Cusack. At no time did he represent to them that he was an agent for another carrier but left the impression by direct statement or inference

that he had his own trucks and performed the service in which they were interested.

The rule is well-established according to authorities hereinafter cited that where substantial evidence has been introduced to support the charges contained in an information a motion for acquittal should be denied since it is a question for the jury to determine whether the effect of the evidence is sufficient to overcome any reasonable doubt as to the defendant's guilt. Likewise, the effect and weight of the fair inferences to be drawn from the evidence is one for the jury.

After the motion for acquittal was denied, the defendant took the witness stand and testified in his own behalf. He admitted that he had no broker's license from the Interstate Commerce Commission nor did he have a certificate of convenience and necessity as a common carrier or as a motor carrier for transporttaion of goods in interstate commerce. Furthermore, he stated that he had no trucks or equipment and did not engage in interstate hauling. He admitted that he made contracts and arrangements with the various people who testified under each of the nine counts of the information, that they paid him money as a down payment on the shipment of freight; that in each case, he received a certain commission from the money collected amounting to twenty per cent in one case and that he made arrangements with other carriers to handle the business he obtained through his contacts. In substance, all of the elements of the offenses charged in the information were admitted by the defendant in addition to the substantial evidence which had been adduced from the Government witnesses.

The issues of fact in the case were simply whether or not the defendant had contracted, arranged for, and procured transportation on behalf of the persons named in the information; whether or not he had done so for compensation, and whether or not he had a broker's license as required by the section of the Interstate Commerce Act in question. The affirmative defense to the charge was whether or not the defendant was a bona fide agent for some carrier which had a certificate of convenience and necessity and as such came within the exception stated in the section of the Act under which he was charged. If the jury found that he was a bona fide agent working for a fixed salary, using the standard set up in the *Chicago Food Mfrs.* case hereinafter cited, no broker's license was required, and therefore he should be acquitted. Since these issues were presented to the jury under a proper instruction favorable to the defendant's position, although no jury instruction was requested by the defendant, the verdict was returned for conviction and thus the questions of fact were resolved by them.

The defendant's motion to set aside the verdict and arrest the judgment was properly denied by the trial court in the exercise of its sound legal discretion. The cases hereinafter cited hold that the denial of such a motion is a matter of discretion with the trial court and will not be disturbed on appeal unless there was an abuse of discretion. No motion was made for new trial. The defendant indicated that he was satisfied with instructions of the trial court before the jury retired to deliberate on their verdict. It must be noted also that whatever objections the defendant had to the form of information, it was not raised by motion to strike prior to the trial.

The only question raised concerning defects in the information related to the failure to allege and prove that defendant did not come within the exceptions stated in the section. Any defect here, which is not conceded, and not supported by the authorities hereinafter cited, was cured by the defendant taking the stand in his own behalf and placing the issue of fact squarely before the jury as to whether or not he was a bona fide agent of a carrier and therefore within the exception.

Therefore, it is submitted that a full and impartial trial was had; that the defendant's rights were preserved by adequate instructions of the trial court; that no reversible error was committed by the Court and that upon the issues of fact the jury has spoken and the judgment should be affirmed.

POINT I.

The Trial Court Committed No Error in Denying the Defendant's Motion for Acquittal at the End of the Government's Case.

A. The Government Was Not Required to Plead the Exceptions Set Forth in the Statute or Prove That Defendant Did Not Come Within Them.

The appellant in his motion for acquittal at the end of the Government's case cited the case of *U. S. v. English* (C. C. A. 5, 1944), 139 F. 2d 885. This case was cited as authority for the proposition that where a statute or a section thereof sets forth certain forbidden acts and includes therein certain exceptions which are mostly bound with the elements of the offense, the pleading must allege the defendant is not within the exception. This case is referred to again on page 10 of appellant's opening brief,

line 17, and it is stated therein that since this Court is familiar with that decision and with this Act the defendant has little to worry about in the ultimate decision on this appeal.

The *English* case must be distinguished both on its law and on the facts. It was an appeal from the District Court of the United States for the Eastern District of Texas to the 5th Circuit Court of Appeals. An information in 22 counts was filed against English charging that he engaged as a common carrier in Interstate Commerce by motor vehicle without having a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of Section 306(a) of Title 49 U. S. Code. The court below sustained a motion to quash the information on the ground that each count thereof was defective in that it failed to negative the statutory exceptions. The sole question upon appeal was whether or not the information was required to negative the statutory exceptions in order to charge a valid offense. In that case the Court affirmed the decision of the District Court but had this to say about the exception to the rule so affirmed:

> "If the Congress had intended that the exceptions written into the statute should be for defensive use only, this result might easily have been accomplished by omitting the opening clause of the statute, thereby causing the section to begin: 'No common carrier by motor vehicle * * *.' Instead Congress chose to begin the statute with the words 'except as otherwise provided in this Section and in Section 310(a)'. This deliberate action must be construed to indicate the legislative intent that the exceptions referred to should be read into and construed with the affirmative definition of the offense."

At this point, we must observe that Section 311(a) of Title 49, U. S. Code, under which the defendant was charged and convicted reads as follows:

> "No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * * And provided further that the provisions of this paragraph shall not apply to any carrier holding a certificate or permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water."

Thus it is clear that an important distinction exists according to the rule of the *English* case between the wording of Section 311(a) and Section 306(a). The Court went on to clarify the rule by citing the leading case of *United States v. Cook,* 17 Wall. 168, 84 U. S. 168, 21 L. Ed. 538, in its opinion on page 886. In the *Cook* case, the Court held that where a statute defining an offense contains an exception in its enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but where the

language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without reference to the exception, the matter contained in the exception must be set up as a defense by the accused.

It is submitted, therefore, that the present case upon appeal comes within the rule of *McKelvey, et al. v. United States,* 260 U. S. 353, a case that went upon certiorari from the Circuit Court of Appeals for the 9th Circuit and decided in 1922. There were five petitioners who were indicted, tried, and convicted in the District Court of the United States for the District of Idaho upon a charge of unlawfully preventing and obstructing by means of force, threats and intimidation, free passage over and through certain unoccupied public lands of the United States by designated persons. The Circuit Court of Appeals affirmed the judgment, and it was affirmed by the U. S. Supreme Court.

One ground of objection was that the indictment contained no showing that the accused were not within the exception made in the proviso in question.

The Court held that this is not a valid ground and had this to say in stating the rule:

> "By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." (Cases cited.)

Therefore, in accord with the authorities above cited, the trial court committed no reversible error in denying the defendant's motion for acquittal, which was based upon the Government's failure to prove that the defendant was within the exception stated in Section 311(a). It was pointed out that in the Court's opinion there was a distinction between the exception provided in Section 306 and Section 311, and this distinction was carefully preserved by the *English* case cited by the appellant and set forth herein above. [Tr. 179-180.]

B. The Evidence Was Sufficient and Adequate to Sustain a Denial of Defendant's Motion for Acquittal.

In denying the motion of defendant for acquittal and commenting upon the evidence, the trial court had this to say:

> "And furthermore, the proof here shows conclusively, [110-C] so far as a *prima facie* case can show, that this man at no time had a permit. And, futhermore, that he did not have any relation of agent or employee to the carrier who transported the goods. It may be well that the evidence will show to the contrary."

Also, on pages 181-183 of the transcript of record, the Court said before passing judgment, but after the verdict had been rendered and the jury excused, concerning the evidence in this case:

> "The evidence clearly shows that at no time were these persons informed that he (Cusack) was merely an agent soliciting for others, and that the services were rendered by someone else. The only real invoices, which may be called such, would indicate the agency on this perhaps by the United Van Lines, such

as Exhibit 13, which contains the actual charges, and which were rendered after the transportation had been effected."

"I think the evidence in this case shows not only a wilful, if any distinction can be made in wilfulness, but [171] a deliberate setting out to violate the law and leading people to believe that the defendant was what he was not. I think it is quite evident from this advertisement and also from the bill of lading. In the advertisement the defendant is not holding himself out as agent for anyone else. (Reference was made to Plaintiff's Exhibit 8.)"

The issues of fact which were presented to the jury in this case were simply whether or not the defendant, Cusack, was a person who advertised or held himself out or contracted and procured transportation for household goods to be shipped in Interstate Commerce without having a broker's license issued by the Interstate Commerce Commission or whether he was a bona fide agent or employee of some carrier which had the proper authority and necessary permits to engage in interstate commerce. Since the latter issue is contained in the exception set forth under Section 311(a), it became a matter of affirmative defense under the rulings of the trial court and when the defendant took the witness stand as he did in this case [Tr. 129-155] he placed this issue squarely up to the jury.

Thus as the trial court pointed out on page 180 of the transcript of record, the defendant by taking the witness stand presented his question of agency as a question of fact and he is not in a position to claim that he was within the exception. (As a question of law upon appeal.) (Italics ours.)

Notwithstanding the fact that counsel for the defendant did not present any instructions to the trial court on behalf of the defendant, the court gave a very elaborate instruction to the jury setting forth the exception under 311 and stating to the jury that if the evidence before them showed that the defendant was within the exception, or it even raised a reasonable doubt as to whether he was, he was entitled to an acquittal. [Tr. 180-181.] The jury was further instructed that:

> "The defendant claimed that he acted in the capacity of agent or broker for a motor carrier having a certificate of convenience and necessity to engage in the particular transaction wholly or jointly with other motor carriers holding like certificates or permits.
>
> "If you find that he did so act, or if the evidence raises a reasonable doubt as to whether or not he did so act, you must acquit the defendant. [155]" [Tr. 166-167.]

Therefore, by having the issues of fact placed before the jury and the affirmative defense brought to their attention by an adequate instruction, these questions were resolved by the jury in their verdict, and it is submitted that the evidence as set forth in the transcript of record and in the summary of facts published herein is amply sufficient to sustain the verdict of the jury on each and every count.

Rule 29(a) of the Rules of Criminal Procedure provides as follows:

> "(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own

motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

However if there is substantial evidence to support the charges contained in an information, a motion for acquittal should be denied because it is a question for the jury to determine whether the effect of the evidence is such as to overcome any reasonable doubt of guilt. In *Gorin v. United States* (C. C. A. 9, 1940), 111 F. 2d 712, at 721, this Court said:

> "Appellants contend that the court erred in failing to direct a verdict in their favor, because of insufficiency of evidence. The applicable rule is that if there is substantial evidence to support the charges, then a peremptory instruction of acquittal should not be made, but it is a question for the jury to determine whether 'the effect of the evidence was such as to overcome any reasonable doubt of guilt.' *Pierce v. United States,* 252 U. S. 239, 251, 252, 40 S. Ct. 205, 210, 64 L. Ed. 542. Likewise, the effect and weight of the fair inferences to be drawn from the evidence for appellee is for the jury. *Gunning v. Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720."

POINT II.

The Trial Court Committed No Error in Denying the Motion of the Defendant to Set Aside the Verdict and for Arrest of Judgment.

A. No Prejudicial Instruction Was Given the Jury by the Trial Court Relative to the Issue of the Defendant Holding Himself Out as a Broker.

In support of his motion for arrest of judgment and to set aside the verdict, the defendant relied upon two grounds, first that the evidence in the case does not support the judgment, and second that prejudicial statements were made in open court to the effect that only the mere holding out of a person to sell transportation service subject to the Act constituted a violation of the brokerage section of the Code. [Tr. 174.] Defendant had this further to say on page 176 transcript of record:

> "The way I understood the Court's interpretation of the statute was that the Court's instruction of the wording was to the effect, and I am sure the impression of the jury was to the effect that in the limitation of the statute itself was that the defendant was holding himself out as a broker."

The trial court's answer to this on page 176:

> "There is no such statement in the record and certainly not in my instructions."

The trial court did instruct the jury however in the language of the statute, Section 311(a) of Title 49 of the United States Code as follows:

> "(a) License Required: No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract agreement,

or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions. * * *"

"Therefore, if you find from the evidence, beyond a reasonable doubt, that the defendant, Clem J. Cusack, did knowingly and wilfully for compensation, and without a broker's license, sell, or offer for sale, transportation subject to the Interstate Commerce Act, or make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or did hold himself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, you must find the defendant guilty as charged in such count of the information as to which you find these facts to be true beyond a reasonable doubt." [Tr. 164-165.]

"The jury was further instructed that a broker is defined within the meaning of Section 311(a), Title 49, U. S. Code, as being any person, not a common or contract carrier, by motor vehicle, who or which as principal or agent sells or offers for sale any transportation subject to the Interstate Commerce Act, or who holds himself out by solicitation, advertisement or otherwise as one who sells, provides, furnishes, contracts or arranges, for such transportation." [Tr. 165.]

It is submitted that the above instructions embody a correct statement of the law in that they follow the language of the statute and the definition of a broker as given under Section 303(a) (18). It is further submitted that the evidence is amply sufficient to warrant a finding by the jury that the defendant did hold himself out as one who contracts, arranges for, and procures transportation of household goods in interstate commerce.

A conviction under this section was sustained in the 5th Circuit Court of Appeals, 1947, under a similar set of facts in the case of *Garland v. United States,* 164 F. 2d 487. In that case the Court cited *Martin v. United States,* 10 Cir., 100 F. 2d 490, and pointed out that all of the attacks against this Federal statute (311(a)) had been raised after the conviction of the appellant in the District Court and that all of such points had been correctly decided against him.

The Motor Carrier Act was held to be constitutional in the *Martin* case, *supra,* and the Court rejected the contention that it failed to define a standard of conduct from which it may be determined when and under what circumstances its provisions are violated. This case defines all the terms which are relevant to the present case on appeal such as a broker, common carrier, by motor vehicle, and sets forth the terms of the various exceptions to the statute in question. There was also a question raised in that case of variance between pleading and proof, and in respect to that question the Court said that there was evidence from which the inference could be reasonably drawn

that the system existed throughout a large part of the United States and that all of appellants understood it and participated in it. And that the proof substantially conformed to the charge.

In the *Martin* case, as in the present case on appeal, the appellant testified in his own behalf. Otherwise appellants did not offer any evidence. There the court said an examination of the entire record indicates clearly that the verdict was right, and that the reference to Section 211 of the Statute cannot be regarded as substantial prejudice. A judgment should not be reversed for a harmless error. Cases cited were *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, and *Tanchuck v. United States,* 10 Cir., 93 F. 2d 534.

In the case of *Interstate Commerce Commission v. Chicago Food Mfrs. Pool,* 39 Fed. Supp. 283 at 290 and 291, a distinction is drawn by the Court between a broker and a salaried agent. In that case, it was held that the defendant was not a broker but an agent for certain carriers and that he received a salary and worked for one employer. He did not advertise or hold himself out to the public as a broker, and apparently he did not solicit any shipments which could not profitably be combined with those of his employer.

As set forth hereinabove, the distinction between an agent and a person who held himself out as an independent contractor for interstate shipments of household goods, such as a person who is commonly known as a broker, was

preserved by proper instructions of the trial court. Since these issues were questions of fact they belonged to the jury alone to decide and now that they have spoken in their finding that defendant Cusack was a person within the classification set forth in Section 311(a), and that he did not have a broker's license, as required, it is submitted that their finding of fact and the judgment of trial court should not be disturbed.

B. The Trial Court Did Not Abuse Its Discretion in Denying the Motion of Defendant to Set Aside the Judgment.

A motion to vacate or set aside the judgment is within the trial court's sound legal discretion and its action will not be disturbed by the appellate court except for clear abuse of discretion. *Western Union Telegraph Co. v. Dismang,* 106 F. 2d 362. The reasoning behind this rule was set forth in the case of *W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons,* 155 F. 2d 321, cert. den. 67 S. Ct. 100, 329 U. S. 735, 91 L. Ed. ....., wherein the Court said that the discretionary nature of jurisdiction to vacate a decree is designed to prevent too ready unravelling of judgments, avoid putting a premium upon continued litigation, and promote considerateness of judicial decision.

POINT III.

The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution, *United States v. Manton,* 2 Cir., 107 Fed. (2d) 834, 839; *Shannabarger v. United States,* 8 Cir., 99 Fed. (2d) 957, 961; *Borgia v. United States,* 9 Cir., 78 Fed. (2d) 550, 555."

The Federal rule set forth in the *Henderson* case prevails in the State courts of California and is expressly set forth as a principle to guide the State Supreme Court and Courts of Appeal in Article VI, Section 4½, Constitution of California, which reads in part as follows:

> "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court

shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Miscarriage of justice has been defined in the case of *People v. Fleming,* 106 Cal. 357, as meaning the conviction of a person who is probably innocent.

In *Tupman v. Haberkern,* 208 Cal. 256, 280 Pac. 970, the Court said:

> "The theory of this section is based upon assumption that the reviewing court may find error in the record as a matter of law, and its effect is to release the reviewing court from the rigid rule that prejudice is presumed from error, and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial. Whether the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it. * * *"

Unless, after reading the evidence, the Court shall be of the opinion that a miscarriage of justice has been caused by an error in giving or refusing instructions, the judgment cannot be set aside. An erroneous instruction was held not ground for reversal where guilt appears beyond all reasonable doubt. *People v. Sprague,* 52 Cal. App. 363, 198 Pac. 820; *People v. Froelich,* 65 Cal. App. 502, 229 Pac. 471.

Conclusion.

This is a case in which the evidence is abundantly sufficient to support the verdict of the jury in finding the defendant guilty as charged in all nine counts of the information. There was no reversible error committed by the trial court in the conduct of the trial, or of the Court's instructions given to the jury. The information was adequate and the appellant had a fair and impartial trial. There is no legal or sufficient cause for setting aside the verdict, and the judgment should be affirmed.

Respectfully submitted,

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